LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
FEB 12 1972
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

No. 71-1032

A. W. THOMPSON, INC.,

Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,

and

BILLY J. ARMSTRONG,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BROOKS L. HARMAN
JOSEPH CONNALLY
of
TURPIN, SMITH, DYER,
HARMAN & OSBORN
1010 American Bank of
Commerce Building
Odessa, Texas 79760

COUNSEL FOR PETITIONER

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented for Review	2
Constitutional Provisions and Statutes Involved	3
Statement of the Case	4
Reasons Relied on for the Allowance of the Writ	7
Certificate of Service	14
Appendix	1a
A. Opinion of the United States Court of Appeals for the Fifth Circuit	1a
B. Decision and Order of the National Labor Relations Board	11a
C. 29 U.S.C.A., §157	13a
D. 29 U.S.C.A., §158(c)	14a
E. 29 U.S.C.A., §158(d)	14a
F. 29 U.S.C.A., §159(c)(1)	16a
G. 29 U.S.C.A., §159(e)(1)	18a
H. The First Amendment to the Constitution of the United States	18a

TABLE OF CASES

Brooks vs. National Labor Relations Board, 348 U.S. 96, 75 S. Ct. 176 (1954)	12
Celanese Corp. of America, 95 NLRB 664	12

TABLE OF CASES (Continued)

Page

H. K. Porter Company, Inc. vs. National Labor Relations Board, 397 U.S. 99, 90 S. Ct. 821 (1970) 7, 9, 10

International Association of Machinists and Aerospace Workers, AFL-CIO vs. National Labor Relations Board, 416 F. 2d 809 (CA-D.C., 1969) 7, 11, 13

United Steel Workers of America, AFL-CIO vs. National Labor Relations Board, vs. Florida Machine and Foundry Company et al, 441 F. 2d 1005 (CA-D.C., 1970) 7, 9

STATUTES

28 U.S.C.A., §1254 2

29 U.S.C.A., §157 3

29 U.S.C.A., §158(c) 3, 12

29 U.S.C.A., §158(d) 3, 8

29 U.S.C.A., §159(c)(1) 3

29 U.S.C.A., §159(e)(1) 3

29 U.S.C.A., §160(e) 6

IN THE
SUPREME COURT OF THE UNITED STATES

No. _____

A. W. THOMPSON, INC.,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,

and

BILLY J. ARMSTRONG,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in the captioned case on November 16, 1971.

I. OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit dated October 25, 1971, is reported at ____ F.2d ____, 66 L.C. 12,139. A copy of such Opinion is appended hereto in accordance with Rule 23 of this Court. The Decision and Order of the National Labor

Relations Board dated June 30, 1970, is reported in 184 NLRB 14. A copy of such Decision is appended hereto.

II. JURISDICTION

The date of the Judgment of the United States Court of Appeals for the Fifth Circuit is November 16, 1971. The Order overruling Petitioner's Petition for Rehearing and Petition for Rehearing En Banc is dated December 29, 1971. Jurisdiction is conferred upon this Court to review the Judgment of the United States Court of Appeals for the Fifth Circuit by Writ of Certiorari by 28 U.S.C.A., §1254.

III. QUESTIONS PRESENTED FOR REVIEW

A. Whether Petitioner violated the National Labor Relations Act by withdrawing recognition from the Union and requesting the Board to conduct an election upon receipt of written statements of 81% of its bargaining unit employees to the effect they no longer wanted to be represented by the Union which had been certified for more than one year.

B. Whether there is substantial evidence to support the Board's finding that Petitioner's officers did not in good faith believe the Union no longer represented a majority of the bargaining unit employees at the time Petitioner refused to bargain further with the Union.

C. Whether there is substantial evidence to support the Board's finding that Petitioner failed to display the degree of diligence that proper performance of its bargaining obligations required.

D. Whether Petitioner violated the Act by attempting to bargain with the Union about a 'bumping' procedure clause after agreement had been reached on all other contract provisions.

E. Whether there is substantial evidence in the Record to support the Board's finding that the Union's loss of majority among Petitioner's bargaining unit employees was caused by unfair labor practices committed by Petitioner's officers.

IV. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the following constitutional amendment and statutes, all of which are set out verbatim in the Appendix:

A. The First Amendment to the Constitution of the United States.
B. 29 U.S.C.A., §157.
C. 29 U.S.C.A., §158(c).
D. 29 U.S.C.A., §158(d).
E. 29 U.S.C.A., §159(c) (1).
F. 29 U.S.C.A., §159 (e) (1).

V. STATEMENT OF THE CASE

Local 826, International Union of Operating Engineers, AFL-CIO, was certified by the National Labor Relations Board as the bargaining representative of Petitioner's employees on August 10, 1966; a contract was entered into between Petitioner and the Union on November 16, 1967, to be effective on that date and for ninety (90) days thereafter, and to continue in force and effect unless either party should notify the other of its intention to renegotiate the contract, which notification would automatically terminate the contract sixty (60) days from its date. Such a notice was delivered to Petitioner by the Union in June of 1968. The first bargaining session for a new contract was held July 24, 1968, before the old contract had expired. The Union was represented by its then Business Agent, Frank Parker, in bargaining sessions through October 4, 1968. Thereafter, it was represented by its current Business Representative, Kenneth Howell. Respondent was represented by its President, Frank Thompson.

Petitioner and the Union met for five formal bargaining sessions after February 1, 1969, the date Petitioner allegedly commenced its refusals to bargain in good faith. The first such meeting occurred on February 12, 1969, and adjourned with an agreement the parties would reconvene on March 5, 1969; that meeting was cancelled by a representative of the Federal Mediation Service who was unable to attend; the meeting was rescheduled for March 13, 1969, but Respondent's lawyer was unable to attend and the second meeting eventually occurred on March 18, 1969. Upon adjourn-

ment of that meeting, the parties agreed to meet again April 8, 1969, and that meeting took place as scheduled; Petitioner's President presented graphs and charts comparing his wage scale with that of his competitors and told the Union negotiator business was bad and he had fewer rigs running than ever in the past thirteen years. Mr. Howell replied he knew business was bad all over the oil field and felt it was not a good time to be negotiating. He suggested adjournment for an indefinite period until he contacted Petitioner to arrange another session. Nothing further was heard from the Union until Mr. Howell requested a meeting for June 4, 1969; Respondent's lawyer was not available until June 17, 1969, when another meeting was held, but the lack of bargaining sessions between April 8 and June 4 resulted from the Union's suggestion that meetings be postponed until business improved. At the June 4 session, Respondent's President requested a negotiating session for the following week, but Mr. Howell refused to meet and bargain, and set a deadline of June 20, 1969, for Respondent to answer his demand for a 20 cent per hour across-the-board wage increase. On that date, Petitioner's lawyer advised Mr. Howell Petitioner agreed to the wage increase and they arranged to meet for another negotiating session on July 1, 1969. At the July 1 session the parties reached agreement on every question except the bumping procedures clause to be included in a new contract. The Union representative refused to negotiate on this question and left the meeting intending to take a strike vote, which proved to be a dismal failure from the Union's standpoint. However, it was not until 30 days after that July 1 bargaining session that the Union filed its unfair

labor practice charge accusing Petitioner of not bargaining in good faith. In the interval between the last bargaining session and the filing of the charge the Union's strike vote had been unsuccessful, 81% of the bargaining unit employees had stated they no longer wanted to be represented by the Union, Petitioner had notified the Union it no longer recognized it as the bargaining representative of its employees, and Petitioner and certain employees had filed decertification petitions with the Regional Director.

Petitioner became aware of its employees disaffection from the Union on July 13, 1969, when one of its officers, Ted Toft, saw writings to that effect signed by 125 of the 154 bargaining unit employees. Between that date and July 19, 1969, Petitioner's President, Frank Thompson, addressed the employees who worked on all drilling rigs except Rig #2 on the subject of the Union and his negotiations with them. He addressed the employees of Rig #2 on July 11, 1969, but the only three employees from that rig who signed a petition had done so before July 10, 1969; so it is chronologically impossible that those speeches were the procuring cause of any of the signatures on the employees' statements of disavowal of the Union. Two employees who were instrumental in circulating the anti-union petitions testified the Union held strike vote meetings on July 3, 1969, from which they came away convinced the Union no longer had the support of a majority.

Federal jurisdiction in the United States Court of Appeals for the Fifth Circuit is conferred by 29 U.S.C.A., §160(e).

VI. REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

THE OPINION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE OPINION OF THIS COURT SET OUT IN *H. K. PORTER COMPANY, INC. VS. NATIONAL LABOR RELATIONS BOARD*, 397 U.S. 99, 90 S. Ct. 821 (1970) AND WITH DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA IN *UNITED STEEL WORKERS OF AMERICA, AFL-CIO VS. NATIONAL LABOR RELATIONS BOARD VS. FLORIDA MACHINE AND FOUNDRY COMPANY, ET AL.* 441 F. 2d 1005 (CA-D.C., 1970), AND *INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, VS. NATIONAL LABOR RELATIONS BOARD*, 416 F. 2d 809 (CA-D.C., 1969),

A question of exceptional importance is raised by the Opinion of the Court of Appeals that Petitioner's conduct at the bargaining table failed to display the degree of diligence required by the National Labor Relations Act. That part of the Court's Opinion is in conflict with the decision of this Court in *H. K. Porter Company, Inc., vs. National Labor Relations Board*, 397 U. S. 99, 90 S. Ct. 821 (1970), as well as the Decision of the United States Court of Appeals for the District of Columbia in *United Steel Workers of America, AFL-CIO vs. National Labor Relations Board vs. Florida Machine and Foundry Company, et al*, 441 F. 2d 1005 (CA-D.C., 1970).

The Opinion mentions first that Petitioner failed to meet with the Union at reasonable intervals, citing evidence of protracted negotiations and few meetings between the parties, but it was at the instigation of the Union, not Petitioner, that no bargaining sessions were held between April 8 and June 4. A meeting took place June 17, and on June 20, Petitioner agreed to the Union's proposal for a wage increase which had been the principal question negotiated for almost a year. The parties met again on July 1, and were in substantial agreement on every provision for a new contract with the single exception of bumping procedures.

The Board found that Petitioner's request that the Union bargain on bumping procedure after all other items had been agreed upon constituted a maneuver on the part of Petitioner to avoid entering into an agreement with the Union, but employers are not compelled by the Act to concede to bumping procedure provisions proposed by a Union without bargaining; to the contrary, bargaining over contract provisions is the mutual obligation of the Employer and the representative of the employees (29 U.S.C.A., §158(d)). Petitioner did not refuse to bargain, it requested that the Union bargain over bumping procedures. It was the Union representative who refused to bargain further, left the room and called a strike vote which showed that the Union no longer had the support of a majority of Petitioner's employees. The Board and the Court below found this loss of support resulted, at least in part, from the Union's inability to reach an agreement on a contract and, accordingly, have

ordered Petitioner to bargain further with a Union which Petitioner's employees no longer want. This part of the Opinion is in conflict with the holding in the *Porter* case, supra, that the Act as presently drawn does not contemplate that Unions will always be secure and able to achieve agreements with employers when their economic position is weak.

In the *Porter* case the Board found the refusal of the Employer to grant a dues check-off clause was based on a desire to frustrate agreement and not on any legitimate business reason, and that motive constituted grounds for compelling it to execute a contract containing such a provision, but this Court held the Board's function is to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties:

> "It cannot be said that the Act forbids an Employer or a Union to rely ultimately on its economic strength to try to secure what it cannot obtain through bargaining." *H. K. Porter, Inc. vs. National Labor Relations Board*, 397 U.S. 99, 109.

Thus, the finding of the Board and the Court below that Petitioner's request to bargain further over bumping procedures was not proper is in conflict with the *Porter* case. It also conflicts with the interpretation of that decision by the United States Court of Appeals for the District of Columbia in *United Steel Workers of America vs. NLRB*, supra. In the *Steel Workers* case the Court found evidence from which to conclude

the Employer was not acting in good faith and that there was evidence of hostility toward the Union in the harshness of the contract terms proposed. Further support for the bad faith thesis was gained from evidence that the Employer dragged its feet when urged by the Union to schedule frequent negotiating sessions. Based upon these findings, the Board ordered the Employer to cease and desist from such behavior and offer reinstatement to certain workers who had been on strike. The Court held since the Employer met with the Union and actively worked on contract proposals, it is necessary to take a close look at his behavior during negotiations and at his proposals before concluding he had no desire to reach an agreement. The Court refused to approve the Board's finding of bad faith; it held the Board erred by adding to the Employer's obligation to bargain with the Union in good faith an obligation to concede to Union demands for certain contractual terms, citing the *Porter* case. The similarity of the Board's fact findings in the *Steel Workers* case and the present case and the contrast in the Opinions of the Courts of Appeal indicate a conflict between the Fifth Circuit and the District of Columbia Circuit on this important question of Federal law.

The Record contains no substantial evidence to support the Board's finding that Petitioner promoted decertification proceedings or induced the employees to sign the documents repudiating the Union. The talks Frank Thompson made to the employees, referred to in the Opinion of the Court below, took place after the employees' statements disavowing the Union had already been signed. Nevertheless, the Court held the

Board was entitled to order Petitioner to bargain further rather than conduct the decertification election petitioned for by Petitioner, as well as its employees.

This part of the Court's Opinion is in conflict with the Opinion of the Court of Appeals for the District of Columbia Circuit in *International Association of Machinists and Aerospace Workers, AFL-CIO, vs. National Labor Relations Board*, 416 F. 2d 809 (CA-D.C., 1969), where the Court held:

> "The legal principles relating to withdrawal of recognition of a bargaining representative are well settled. Absent special circumstances, the union enjoys an irrebuttable presumption of majority status for one year after certification. Thereafter, the presumption continues but becomes rebuttable upon a showing of "sufficient evidence to cast serious doubt on the union's continued majority status." At that point, the burden shifts to the General Counsel to prove that, on the critical date, the union in fact represented a majority of the employees." 416 F. 2nd 811-812
>
> "The pertinent standard "serious doubt," has two components: a reasonable basis in fact, and good faith." 416 F. 2nd 812
>
> "Since an affirmative showing of this nature is ordinarily not feasible, good faith may, absent evidence to the contrary, be inferred from

the existence of a reasonable basis for doubt." 416 F.2d 813

The lack of any bona fide evidence of bad faith on the part of Petitioner is illustrated by the Board's finding Petitioner unilaterally instituted a wage increase, even though the Board admits in the only foot note to its Decision and Order that the Union had agreed in writing it had no objection to putting the wage increase into effect.

This Court has held that one year after certification an Employer may ask for an election or, if he has fair doubts about the Union's continuing majority, he may refuse to bargain further with it. *Brooks vs. National Labor Relations Board,* 348 U.S. 96, 75 S. Ct. 176 (1954), citing the Board's Decision in *Celanese Corp. of America,* 95 NLRB 664.

Certainly the written statements of 81% of Petitioner's bargaining unit employees is adequate to create a reasonable basis in fact for Petitioner's doubt about the Union's majority status. The Board's finding that alleged bad faith bargaining on the part of Petitioner contributed to the Union 's loss of majority is not supported by substantial evidence and its findings that the alleged unilateral wage increase and Mr. Thompson's speeches to the employees further contributed to the loss of majority are not supported by any evidence. The Record contains no evidence of threats or promises of benefit uttered by Mr. Thompson so his speeches cannot be construed as evidence of unfair labor practices. 29 U.S.C.A., §158(c).

Accordingly, the Opinion of the Court below that Petitioner violated the Act by refusing to bargain further with the Union and requesting a new election is in conflict with the Opinion of the Court of Appeals for the District of Columbia in the *International Association of Machinists and Aerospace Workers* case, supra.

CONCLUSION

For the foregoing reasons, and each of them, Petitioner prays that a Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit.

BROOKS L. HARMAN
JOSEPH CONNALLY
TURPIN, SMITH, DYER,
HARMAN & OSBORN
1010 American Bank of
Commerce Bldg.
Odessa, Texas 79760

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three (3) copies each of Petitioner's Petition for a Writ of Certiorari has been placed in the United States Mail, air mail, postage prepaid, addressed as follows:

Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Honorable Marcel Mallet-Prevost
Asst. General Counsel
National Labor Relations Board
Washington, D.C. 20570

and the undersigned hereby certifies that three (3) copies of Petitioner's Petition for a Writ of Certiorari has been placed in the United States Mail, postage prepaid, addressed as follows:

Honorable Jack Q. Tidwell
Attorney at Law
P. O. Box 1311
Odessa, Texas 79760

this the ____ day of February, 1972.

BROOKS L. HARMAN
One of the Attorneys for
Petitioner

APPENDIX

Opinion of the United States Court of Appeals for the Fifth Circuit.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

No. 71-1130
Summary Calendar*

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

A. W. THOMPSON, INC.,
Respondent.

Application for Enforcement of an Order of the National Labor Relations Board (Texas Case)

(October 25, 1971)

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

---

*Rule 18, 5 Cir.: see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

AINSWORTH, Circuit Judge: The National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, 29 U.S.C. § 151, petitions for enforcement of its order issued against A. W. Thompson, Inc. on June 30, 1970, 184 N.L.R.B. No. 14.[1] Billy J. Armstrong, an employee of Thompson, has intervened as the alleged representative of 125 of 154 employees (81%) in the bargaining unit. He supports the Company's position in full. Alternatively, he asks us to amend the Board's order so as to "guarantee to these Employees the right of a decertification election regardless of whether or not one is wanted by the Board or by the Union." The question before us is whether there is "substantial evidence on the record considered as a whole" to support the Board's findings and order. 29 U.S.C. § 160(e).

After careful consideration of the record as a whole, we find substantial evidence to support the Board's findings, and therefore enforce the Board's order.

A. W. Thompson, Inc. is engaged in the business of drilling oil wells. The Union entered into a collective

---

[1] The Board ordered Thompson to (1) bargain in good faith with Local 826, International Union of Operating Engineers, AFL-CIO, the sole bargaining representative of approximately 154 employees of Thompson, in the bargaining unit in question, duly certified by the Board after election on August 10, 1966; (2) to post notices to employees to the effect that the Company will not interfere with the rights of the employees to select their own bargaining representative and to bargain with said representative; (3) to cease and desist from certain unfair labor practices found by the Board and from interfering with, restraining or coercing its employees in the exercise of their Section 7 rights, 29 U.S.C. § 157; and (4) to notify the Regional Director what steps have been taken.

bargaining agreement with Thompson on November 16, 1967. The contract provided for a termination date 90 days after notice by either party. On June 3, 1968, the Union notified Thompson of its desire to amend the agreement and demanded negotiation. The Board found that by July 1, 1969, there was agreement on all terms. But Thompson refused to sign the agreement claiming that it had reservations concerning the "bumping" clause. The Union called a meeting for a strike vote but only 2 out of 154 employees attended the meeting, indicating that the Union's strength had obviously dissipated. Indeed, during the first two weeks of July, at the behest of Company President Frank L. Thompson and other supervisory personnel, 125 out of 154 employees signed petitions stating that they no longer wanted the Union to represent them. They petitioned the Board for a decertification election. The Union countered with charges of unfair labor practices against Thompson. The Board dismissed the decertification petition and scheduled hearings on the charges.

The Board found that Thompson failed to meet with the Union at reasonable intervals for the purpose of collective bargaining. The record shows that negotiation of the new agreement was protracted. Meetings between the parties were few. The Company as evidence of its good faith maintains that agreement was in fact reached on all but one item (the "bumping" clause). A collective bargaining agreement is a whole composed of many parts. However, all parts must be complete. On September 10, 1968, the Company disapproved of the bumping clause in the old contract. On March 18, 1969, it suggested some "grammatical

corrections" in the proposed clause. At a meeting on July 1, 1969, the parties discussed and agreed on all terms of the agreement, item by item. When the bumping clause was reached, the Company again demanded certain "grammatical corrections." The Union agreed. This was the only item of disagreement because the Union dropped all other demands. Nevertheless, Company President Thompson refused to sign the agreement and again raised the bumping clause matter, stating that he needed more time to examine it and to confer with officers of his Company about it. In the weeks following this action, the Company refused even to negotiate with the Union, unilaterally withdrawing recognition of the Union as bargaining representative of its employees.

Section 8(d) requires employers and representatives of employees "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment ...." We have held on numerous occasions that while the duty does not compel either side to make concessions, it does require that the parties "enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement ...." *Globe Cotton Mills v. National Labor Relations Board*, 5 Cir., 1939, 103 F. 2d 91, 94. See also *N.L.R.B. v. Texas Coca-Cola Bottling Company*, 5 Cir., 1966, 365 F. 2d 321; *Majure v. National Labor Relations Board*, 5 Cir., 1952, 198 F. 2d 735; *N.L.R.B. v. Herman Sausage Co.*, 5 Cir., 1960, 275 F. 2d 229; *National Labor Relations Board v. Whittier Mills Co.*, 5 Cir., 1940, 111 F. 2d 474; *Stonewall Cotton Mills v. National Labor R. Board*, 5 Cir., 1942, 129 F.

2d 629; *National Labor Relations Board v. Athens Mfg. Co.*, 5 Cir., 1947, 161 F. 2d 8; *Tex Tan Welhausen Company v. N.L.R.B.*, 5 Cir., 1969, 419 F. 2d 1265, remanded, 397 U. S. 819, 90 S. Ct. 1516 (1970), modified on other grounds, 5 Cir., 1970, 434 F. 2d 405. "The ultimate issue whether the Company conducted its bargaining negotiations in good faith involves a finding of motive or state of mind which can only be inferred from circumstantial evidence." *National Labor Relations Bd. v. Reed & Price Mfg. Co.*, 1 Cir., 1953, 205 F. 2d 131, 139-140, cert. denied, 346 U. S. 887, 74 S. Ct. 139 (1953).

The Trial Examiner found that the Company "failed to display the degree of dilligence [sic] that proper performance of its bargaining obligations required." The Board agreed with the Trial Examiner and we find that there is substantial evidence to support the Board's finding.

Closely related to respondent's violation of Section 8(d) is the Board's finding that the Company had no sincere intention of reaching an agreement with the Union in violation of Section 8(a)(5) and (1) of the Act.

The Trial Examiner found, and the Board agreed, that "the Thompson demand at the July 1 meeting to review the bumping procedures after all other items had been agreed upon, and after Respondent had earlier indicated its consent to the bumping procedures, constituted a maneuver on the part of the Respondent to avoid entering into an agreement with the Union." The Examiner concluded that the Com-

pany "did not ever intend to enter into agreement with the Union." It is settled that "withdrawal by the employer of contract proposals, tentatively agreed to by both the employer and the union in earlier bargaining sessions, without good cause, is evidence of a lack of good faith bargaining by the employer in violation of § 8(a) (5) of the Act...." *American Seating Company of Mississippi v. N.L.R.B.*, 5 Cir., 1970, 424 F. 2d 106, 108. There is substantial evidence on the record as a whole to support the Board's finding of a violation of Section 8(a)(5).

The Board found a further violation of Section 8(a) (5) when the Company unilaterally effectuated a wage increase. On June 20, the parties had fully agreed to increase wages by 20 cents an hour across the board. The Company wanted to put the increase into effect immediately, but the Union resisted, desiring to incorporate the increase into the final collective bargaining agreement. The Trial Examiner found that "on July 13, without consultation with the Union or a written contract the Respondent put the 20-cent across-the-board wage increase into effect." The Company defends on the ground that the Union had consented to institution of the increase. But the Board found, and we agree, that the Union's purported consent to the increase, following two separate requests to incorporate the increase into the final collective bargaining agreement, arose "only after [the Union] was convinced that the Respondents had no intention of entering into an agreement." Rather, "the Respondent's whole course of action .... is indicative of the fact that it intended to and did place this wage increase

in effect upon its own initiative," in violation of Section 8(a)(5) of the Act, see *N.L.R.B. v. Katz*, 369 U. S. 736, 82 S. Ct. 1107 (1962); *General Electric Co., Battery Prod., Cap. Dept. v. N.L.R.B.*, 5 Cir., 1968, 400 F. 2d 713.

Finally, the Board found violations of Section 8(a)(1) by the Company for withdrawing recognition from the Union as the sole bargaining representative of its employees. An employer may refuse to bargain with a Board-certified union only when he in good faith believes that the Union no longer represents the bargaining unit employees. *N.L.R.B. v. Movie Star, Inc.*, 5 Cir., 1966, 361 F. 2d 346, 351; *Skyline Homes, Inc. v. N.L.R.B.*, 5 Cir., 1963, 323 F. 2d 642, cert. denied, 376 U. S. 909, 84 S. Ct. 662 (1964). At the expiration of the old agreement, Thompson conducted a "secret" poll which showed that a majority of the Company's employees wanted the Union to continue representing them. A year later, when Thompson refused to bargain, 81% of the employees signed petitions to the effect that they no longer wanted the Union. The Company and intervenor Armstrong assert that the Union became weak by its own doings. The Trial Examiner found to the contrary: "... after the July 1 meeting, the Respondent set out on a course of conduct which, I find, was calculated to discourage adherence to the union cause. ... Thompson engaged in talks to employees in which he placed the onus for their not receiving wage increases on the Union; in which he stated he would not sign a contract with the Union; and in which he then attempted, and evidently succeeded in many cases, to persuade the employees to

sign the petitions expressing their desire to rid themselves of the Union. In addition, certain supervisors actually participated in posting the petitions and in urging employees to sign." These activities constitute a violation of Section 8(a)(1) of the Act. As we stated in *N.L.R.B. v. Birmingham Publishing Company*, 5 Cir., 1958, 262 F. 2d 2, 7: "Section 8(a)(1) of the Act makes it unlawful for an employer to instigate and promote a decertification proceeding or induce employees to sign any other form of union-repudiating document, particularly where the solicitation is strengthened by express or implied threats of reprisal or promises of economic benefit."

In *Medo Photo S. Corp. v. National Labor R. Board*, 321 U. S. 678, 64 S. Ct. 830 (1944), the Supreme Court stated that a company "cannot, as justification for its refusal to bargain with the union, set up the defection of union members which it had induced by unfair labor practices, even though the result was that the union no longer had the support of a majority. It cannot thus, by its own action, disestablish the union as the bargaining representative of the employees, previously designated as such of their own free will." 321 U. S. at 687, 64 S. Ct. at 835. In *Franks Bros. Co. v. National Labor Relations Board*, 321 U. S. 702, 64 S. Ct. 817 (1944), the Court recognized that issuance of a bargaining order, as opposed to ordering an election, was well within the discretion of the Board. "The Board might well think that, were it not to adopt this type of remedy, but instead order elections upon every claim that a shift in union membership had occurred during proceedings occasioned by an employer's wrongful refusal to bargain, recalcitrant employers

might be able by continued opposition to union membership indefinitely to postpone performance of their statutory obligation." 321 U. S. at 705, 64 S. Ct. at 819.

We have recognized that the Board, as a remedy for the Company's unfair labor practices, may impose a bargaining order on "at least two grounds: (1) the refusal to let an employer benefit by his own wrongs and (2) the insistence that a union which has won the right to bargain is allowed to enjoy that right." *General Electric Co., Battery Prod., Cap. Dept. v. N.L.R.B.*, 5 Cir., 1968, 400 F. 2d 713, 730. See also *Franks Bros. Co. v. National Labor Relations Board*, *supra*, and *Skyline Homes, Inc. v. N.L.R.B.*, 5 Cir., 1963, 323 F. 2d 642, cert. denied, 376 U. S. 909, 84 S. Ct. 662 (1964). A bargaining order is appropriate even in the absence of proof that the Union's loss of majority was attributable to the unfair labor practices which had been perpetrated by the Company. In *N.L.R.B. v. Movie Star, Inc.*, 5 Cir., 1966, 361 F. 2d 346, we found that "[w]hile it may be that at some earlier point in time the Respondents might have validly asserted a good-faith doubt as to the Union's majority status, they did nothing to dispute that majority status until August 28, when the course of conduct found by the Board to have been violative of the Act was in high gear. The effect of Respondents' numerous Section 8(a)(1) violations was to transform a possible good-faith doubt of the Union's majority into a bad-faith virtual certainty," 361 F. 2d at 351.

More recently, in *J. P. Stevens & Co., Inc., Gulistan Div. v. N.L.R.B.*, 5 Cir., 1971, 441 F. 2d 514, we recognized as did the Trial Examiner herein, that many

of the employees of the Company might not have been affected by the Company's unfair labor practices, and that many of the employees, in the exercise of their free choice would not chose the Union in any event. "But the Board's evaluation of the propriety of a bargaining order cannot be based on employee motivations, determined individual by individual. We cannot require the Board to engage in the hopeless and impossible task of evaluating the subjective reasons for each employee recantation." 441 F. 2d at 527. The Trial Examiner found that "the loss of majority caused in whole or in part by Respondent's unfair labor practices does not justify its refusal to bargain and, under the circumstances, the Respondent cannot be said to have entertained a good-faith doubt as to the Union's majority status. To hold otherwise would result in permitting Respondent to profit from its own unlawful refusal to bargain."

We find substantial evidence on the record considered as a whole to support the Board's findings of Section 8(a)(1), Section 8(a)(5), and Section 8(d) violations upon which the bargaining order was predicated. The Board's choice of remedy must "be given special respect by reviewing courts." *N.L.R.B. v. Gissel Packing Co.*, 395 U. S. 575, 612, 89 S. Ct. 1918, 1939 n. 32 (1969). We decline to amend the order to "inform these Employees and the Board of their right to a decertification election" as intervenor requests. The Board has made a choice between two available remedies. Its choice is amply supported by substantial evidence.

The Board's order is ENFORCED.
Decision and Order of the National Labor Relations Board.

A. W. THOMPSON, INC.

and Case No. 16-CA-3683

LOCAL 826, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO

Rendered June 30, 1970.

DECISION AND ORDER

(June 30, 1970)

On March 18, 1970, Trial Examiner Morton D. Friedman issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, Respondent filed timely exceptions, and a brief in support thereof, to the Trial Examiner's Decision. The General Counsel filed a brief in support of the Trial Examiner's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in this case, and hereby adopts the Trial Examiner's findings, conclusions,[1] and recommendations.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations

---

[1]The Trial Examiner in his Decision expresses the following conclusion "... on July 13, *without consultation with the Unions* or a written contract the Respondent put the 20-cent across-the-board wage increase in effect." (Emphasis supplied). The Respondent in its exceptions contends that this conclusion of the Trial Examiner is erroneous. We do not agree. The Respondent's reliance upon the fact that on July 11, Howell in a letter to Respondent stated the Union would not object "to your (Thompson) putting the increase into effect" is misplaced. As Howell testified, after two previous requests to include the increase in a written agreement he agreed to the increase only after he was convinced that the Respondents had no intention of entering into an agreement.

The record discloses that the parties on June 20, 1969, had come to full agreement as to a 20-cent across-the-board increase, however, the Respondent refused to incorporate such increase in a written agreement as requested by the Union. It is also clear, as found by the Trial Examiner, that the Respondent had no intention of signing an agreement with the Union. Thompson, on or about July 13, came to Rig #10 and told the employees that he would like to give the employees a pay increase but the Union wouldn't let him without signing a contract and he didn't want to sign one. Further, he stated that he was going to go ahead and put a wage increase into effect this date. At the same time he mentioned to the rig crew that petitions were being circulated for a union election (decertification) and offered his help. He also reiterated that he was not going to sign a contract with the Union. Thus, in our opinion, the Respondent's whole course of action, as set forth by the Trial Examiner in his Decision, is indicative of the fact that it intended to and did place this wage increase in effect upon its own initiative.

ORDER

Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that Respondent, A. W. Thompson, Inc., Midland and Odessa, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.[2]

Dated, Washington, D. C. June 30, 1970.

John H. Fanning, Member
Gerald A. Brown, Member
Howard Jenkins, Jr., Member
(SEAL) National Labor Relations Board

---

29 U.S.C.A., Section 157:

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a la-

bor organization as a condition of employment as authorized in section 158(a) (3) of this title. July 5, 1935, c. 372, § 7, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140.

29 U.S.C.A., Section 158(c):

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not consitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

29 U.S.C.A., Section 158(d):

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employ-

ees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification —

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing

contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158-160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

29 U.S.C.A., Section 159(c) (1):

Hearings on questions affecting commerce; rules and regulations

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board —

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section; or (ii)) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the

record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

29 U.S.C.A., Section 159(e)(1):

Secret ballot; limitation of elections

(e) (1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 158(a)(3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

FIRST AMENDMENT TO THE CONSTITUTION OF UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.